ORIGINAL

Supreme Court, U.S.
FILED
MAR 9 - 2005
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Case Number 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON,

PETITIONER,

VS.

RANDY LEE GUZEK,

RESPONDENT.

MOTION TO PROCEED *IN FORMA PAUPERIS*.

The Respondent asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

The Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts: Deschutes County, Oregon Circuit Court, Oregon Supreme Court. Respondent also filed a motion to proceed *in forma pauperis* in connection with his own petition for writ of certiorari in this Court and his petition was placed on the docket on December 20, 2004 as No. 04-7698. Respondent's affidavit or declaration filed in support of that motion is attached hereto.

*Richard Lewis Wolf
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12940 NW Marina Way
Portland, Oregon 97231-2312
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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, RANDY LEE GUZEK, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$25.00	$ N.A.	$25.00	$ N.A.
Self-employment	$ N.A.	$	$ N.A.	$
Income from real property (such as rental income)	$ N.A.	$	$ N.A.	$
Interest and dividends	$ N.A.	$	$ N.A.	$
Gifts	$ N.A.	$	$ N.A.	$
Alimony	$ N.A.	$	$ N.A.	$
Child Support	$ N.A.	$	$ N.A.	$
Retirement (such as social security, pensions, annuities, insurance)	$ N.A.	$	$ N.A.	$
Disability (such as social security, insurance payments)	$ N.A.	$	$ N.A.	$
Unemployment payments	$ N.A.	$	$ N.A.	$
Public-assistance (such as welfare)	$ N.A.	$	$ N.A.	$
Other (specify):	$ NA	$	$ NA.	$
Total monthly income:	$25.00	$	$25.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
DEPT. OF CORRECTIONS O.S.P.	2605 STATE ST. SALEM, OREGON 97310	2002 – PRESENT	$25.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N.A.			$
			$
			$

4. How much cash do you and your spouse have? $ APPROXIMATELY $20.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N.A.	N.A.	$ N.A.	$ N.A.
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N.A.

☐ Other real estate
Value N.A.

☐ Motor Vehicle #1
Year, make & model N.A.
Value

☐ Motor Vehicle #2
Year, make & model N.A.
Value

☐ Other assets
Description N.A.
Value

	You	Your spouse
Transportation (not including motor vehicle payments)	$N.A.	$N.A.
Recreation, entertainment, newspapers, magazines, etc.	$25.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$N.A.	$
Life	$N.A.	$
Health	$N.A.	$
Motor Vehicle	$N.A.	$
Other:	$N.A.	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$N.A.	$
Installment payments		
Motor Vehicle	$N.A.	$
Credit card(s)	$N.A.	$
Department store(s)	$N.A.	$
Other:	$N.A.	$
Alimony, maintenance, and support paid to others	$N.A.	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$N.A.	$
Other (specify):	$N.A.	$
Total monthly expenses:	$25.00	$

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N.A.	$ N.A.	$ N.A.
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N.A.	N.A.	N.A.

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N.A.	$ N.A.
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N.A.	$
Home maintenance (repairs and upkeep)	$ N.A.	$
Food	$ N.A.	$
Clothing	$ N.A.	$
Laundry and dry-cleaning	$ N.A.	$
Medical and dental expenses	$ N.A.	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

DEATH SENTENCE OVERTURNED ON MARCH 4TH, 2004. IF I'M SENT BACK TO THE COUNTY JAIL, I WILL LOSE MY JOB HERE THAT PAYS $25.00 A MONTH (ON AVERAGE). NO JOBS AVAILABLE AT THE COUNTY JAIL.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N.A.

If yes, state the attorney's name, address, and telephone number:

N.A.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N.A.

If yes, state the person's name, address, and telephone number:

N.A.

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I'VE BEEN INCARCERATED SINCE 1987. WHEN I'M ALLOWED TO WORK HERE IN I.M.U. (SPECIAL HOUSING UNIT), I CAN ONLY MAKE APPROXIMATELY $25.00 A MONTH, WHICH I USE TO BUY ENVELOPES, WRITING PAPER, HYGIENE ITEMS, ETC...

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: MARCH 9TH, 2004

(Signature)

No. 04-928

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

PETITIONER,

v.

RANDY LEE GUZEK,

RESPONDENT.

Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE[1]

QUESTION PRESENTED

1.

Petitioner State of Oregon's "Question Presented" asks whether a capital defendant has a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence in support of a residual-doubt claim—that is, that the jury in a penalty phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

Respondent Guzek does not accept Petitioner's framing of the question presented because this is not a residual doubt case as the Oregon Supreme stated:

> We note that, in *Franklin v. Lynaugh*, 487 U.S. 164, 172, 108 S. Ct.2320, 101 L.Ed 2d 155, *rehearing den*, 487 U.S. 1263, 101 L. Ed 2d 976, 109 S. Ct. 25 (1988); *id.* at 187-88 (O'Connor, J., concurring), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. However, nothing in that decision lessened the direction from *Lockett, Bell, Eddings*, and *Green* that the Eighth Amendment *does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.

State v. Guzek, 336 Or. 424, 463, n.30, 86 P.3d 1106, 1128 (2004).

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[1] As noted in Mr. Guzek's *Petition for Writ of Certiorari* at page i, footnote 1, the procedural posture of this case does not appear to strictly comport with the definition of "Capital Case" in United States Supreme Court Rule 14.1(a). Petitioner has (with explanation) affixed the heading "CAPITAL CASE" to his filings in this Court. In contrast, Respondent has – without reservation – captioned its filings as such, in contradiction to its argument that Mr. Guzek's Petition for Writ of Certiorari is not properly before this Court by reason of speculation that Petitioner may not receive a death sentence on his remand to the trial court for a fourth sentencing proceeding, contrary to the result in the three prior sentencing proceedings.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Randy Lee Guzek, asks this Court to deny the petition for a writ of certiorari filed by the State of Oregon which seeks review of one holding in the Oregon Supreme Court's decision in *State v. Guzek*, 336 Or. 424, 86 P.3d 1106 (2004), which vacated a death sentence imposed following a penalty-phase retrial.[2]

REASONS THE WRIT SHOULD BE DENIED

Petitioner State of Oregon asks this Court to grant its petition and review whether a capital defendant has a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument during the penalty phase in support of a residual-doubt claim. Petitioner's framing of the question ignores that the Oregon Supreme Court explicitly acknowledged this Court's plurality ruling in *Franklin* and distinguished Mr. Guzek's case from *Franklin* by stating this was not a residual doubt case. *State v. Guzek*, 336 Or. at 463, n.30, cited *verbatim*, *infra* at page i.

A.

ALTHOUGH THE RULING BELOW WAS INFORMED BY FEDERAL LAW, IT WAS PREMISED ON CLAUSES OF TWO STATE STATUTES.

The Oregon Supreme Court also ruled that Mr. Guzek's grandfather's alibi testimony was required to be admitted pursuant to Oregon Revised Statute 138.012, which provides, in relevant part, that

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[2] Mr. Guzek has filed his own petition for a writ of certiorari, in Supreme Court Case No. 04-7698, on December 7, 2004 and placed on the docket December 20, 2004. Mr. Guzek seeks review of the Oregon Supreme Court's holding that Oregon's death penalty scheme violates the Eighth Amendment Cruel and Unusual Punishment Clause by allowing a sentence of death upon proof less than "beyond a reasonable doubt" concerning the probability a defendant may commit future acts of violence thereby relieving the state of its burden in violation of the Due Process Clause of the Fourteenth Amendment. Mr. Guzek also asks this Court to review whether the Oregon Supreme Court's holding admitting victim impact evidence in the fourth penalty phase proceeding violates the *Ex Post Facto* Clause of the United States Constitution. *See Guzek*, 336 Or. at 447 (so holding).

> "* * * [i]f a reviewing court finds prejudicial error in the sentencing proceeding only, * * * * * [a] transcript of all testimony and all exhibits, and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. * * *" [3]

The ruling admitting this alibi evidence was made exclusively under Oregon law without a single reference to any federal constitutional provision. The Oregon Supreme Court ruling admitting the grandfather's alibi evidence simply held:

> Because the analysis of their relevance is different, we address separately the two different types of alibi evidence that defendant sought to present to the jury. The transcript of defendant's grandfather's testimony -- like the transcript of any other witness's testimony -- was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. ORS 163.150(1)(a); *see also* ORS 138.012(2)(b) (if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.
>
> *Guzek III*, 336 Or. at 451.

The dissenting opinion noted that the state neglected to offer briefing on the differing bases of admissibility for the grandfather's alibi evidence and mother's alibi evidence.[4] Therefore, Petitioner State of Oregon is in no position to ask this Court to review the admissibility of the grandfather's alibi evidence, having failed to make any argument in the state court with respect to whether or not the evidence was admissible as a matter of state law, and the Oregon Supreme Court resting its decision squarely on that basis. Consequently,

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[3] Or. Rev. Stat. §138.012(2)(a,b).

[4] n31 For some reason, the state did not, in its extensive briefing in this case, separately discuss either the grandfather's or the mother's testimony. *Guzek III*, 336 Or. at 469.

half of Mr. Guzek's proffered alibi testimony will be admitted in the fourth capital sentencing proceeding pursuant to an independent and adequate state ground regardless of whether the State's petition is granted in this Court. There is simply no federal question raised with respect to grandfather's alibi testimony.

B.

TO THE EXTENT THE SOURCE OF THE STATE APPELLATE COURT'S RULING IS UNCLEAR OR AMBIGUOUS, THE MATTER SHOULD BE REMANDED FOR CLARIFICATION.

Before fully addressing the merits of Petitioner's request for review, it will be indispensably helpful to set forth the complicated and unusual state appellate court record from which this issue arose.

The Oregon Supreme Court's decision holding the alibi evidence admissible, arose from four separate assignments of error, concerning four separate types of evidence, in Mr. Guzek's brief on direct review below from the sentence of death. Mr. Guzek combined his arguments on those four assignments of error, in his brief before the Oregon Court. This was because the primary thrust in all four assignments of error, was that the trial court had erred by (1) on the one hand, admitting the transcript testimony (through surrogate witnesses, *i.e.* actors) of Mr. Guzek's codefendant murderers adduced in the culpability phase of his first trial, pursuant to Or. Rev. Stat. 138.012(2)(b); whereas (2) the trial court did not permit Mr. Guzek to introduce similar forms of evidence in order to impeach that testimony.[5] Several of

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[5] The Oregon Supreme Court accurately summarized this background, and the purposes for which introduction of the disputed evidence was sought, with respect to the non-alibi evidence at 336 Or. at 444-47: inexplicably, however the court claimed that Mr. Guzek's alibi evidence proffer was predicated on it being mitigating evidence concerning the circumstances of the offense. While that argument was preserved, it was not Mr. Guzek's primary assertion, and as the court noted, that assertion was predicated mainly on Oregon statute, that is Or. Rev. Stat. 163.150(1)(b)(D). *Id.* 336 Or. at 450-51.

those items of evidence -- which directly attacked the credibility and veracity of the co-defendants regarding Mr. Guzek's relative culpability for the homicides -- came into existence after his conviction.

Mr. Guzek urged in the state appellate court that it violated his rights under the state evidence code,[6] and under the state and federal constitutional confrontation clauses,[7] to deny him the right to impeach the transcript testimony of the codefendants in that manner.

The four assignments of error, and combined arguments thereon submitted in Mr. Guzek's state appellate brief, are submitted herewith as Supp. App. "A". An examination of that excerpt from Mr. Guzek's brief, makes it entirely clear that he did not primarily rest his claims upon the Eighth Amendment, or upon any purported scope of mitigation controlled solely by that United States Constitutional provision[8].

Mr. Guzek's claims and arguments may be succinctly summarized as follows:

In his capital *Assignment of Error No. 16* he asserted that the trial court erred in denying Mr. Guzek's motion to exclude testimony by transcript of his codefendants (Mark Wilson and Donald Cathey); and by allowing such testimony to be read by surrogates to the jury.

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[6] Ore. Evid. Code 803(3), 804(1), 806

[7] Or. Const. Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right to *** meet the witnesses against him face to face****"); UWS Const. Am. VI (in all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***").

[8] Mr. Guzek did, of course, *raise and preserve* Eighth Amendment claims, but his extensive argument before the Oregon Supreme Court was premised almost entirely upon non-constitutional state legal authority. Nonetheless, by stressing that point herein, Mr. Guzek in no manner waives his right to rely upon such Eighth Amendment authority, and any and all other federal constitutional provisions and jurisprudence, which he raised below. *See, Howeell, supra.* (failure to raise a claim or argument in a brief Opposing a Petition for Certiorari, may operate as a waiver of the opponents right to rely on such authority in the event this Court accepts review on the merits.

Assignment of Error No. 17 : The trial court erred in allowing testimony of the plea agreements of the codefendants.

Assignment of Error No. 18 : The trial court erred in excluding testimony and evidence impeaching the transcript testimony of the codefendants.

Assignment of Error No. 19 : The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, *"in answer to and impeachment of* the transcript testimony of Mark Wilson and Donald Ross Cathey." (Emphasis added by Mr. Guzek).

These complaints below arose primarily from plea agreements between the state and Mr. Guzek's codefendant's. In exchange for their testimony against Mr. Guzek, the two were spared death sentences, but their plea agreements stipulated that their failure to testify as expected would result in capital prosecution. The two received life sentences with the possibility of parole, in exchange for their live testimony in Mr. Guzek's first trial.

Both codefendants refused to testify in the two subsequent re-sentencing trials. As a result, the transcripts of their prior testimony were read to the juries by surrogates, over Mr. Guzek's objection. In each re-sentencing trial, Mr. Guzek sought to impeach the credibility of the codefendant's hearsay testimony. In his most recent re-sentencing trial, Mr. Guzek sought to do so via the following;

(1) An affidavit of a defense investigator who interviewed Cathey in prison in 1991, which for the first time contradicted much of Wilson's live testimony in the first trial.

(2) Memorandum of a second defense investigator recounting several prison conversations with Wilson, also contradicting much of his own original trial testimony relied upon by the prosecutor in arguing to the jury that Mr. Guzek was the most culpable of the three.

(3) April, 1993 Deposition of Wilson, given in the course of his *habeas corpus* proceeding, therein, Wilson variously claimed memory loss as well as contradicting most of his original trial testimony (even claiming he did not know a rifle was loaded which Wilson previously testified he used to kill a victim in this case with 20 shots.

(4) Live testimony of women's prison inmate who met Wilson in the course of their mutual work as prison paralegals. This female inmate would have related a phone call in which Wilson gave yet another version of the events on the night of the homicides.

(5) Testimony of the lead detective who investigated the homicides, concerning a prior report he prepared in 1987: admission of a school record was sought to impeach this testimony (the detective had died prior to the third re-sentencing trial).

(6) Testimony of a defense investigator who had read a letter written from Wilson to the female prison paralegal regarding willingness of Wilson to testify for Mr. Guzek in a more truthful manner than originally.

(7) Evidence of a conversation between Wilson's lawyer and Mr. Guzek's lawyer regarding Wilson's willingness to testify more truthfully in the third re-sentencing trial.

(8) Testimony of Wilson's ex-wife regarding statements made to her that contradicted Wilson's original trial testimony, as well as his statement to her that he would invoke the Fifth Amendment in the retrial due to uncertainty whether the prosecutor would revoke the plea agreement and subject Wilson to a capital trial if he revealed the actual circumstances of the offense.

(9) The prior testimony of Mr. Guzek's grandfather, since deceased, which tended to establish an alibi for Mr. Guzek during the time period Wilson and Cathey claimed the offenses occurred.

(10) Testimony of Mr. Guzek's mother as to circumstantial evidence that he had been asleep at her residence asleep at the time of the homicides.

Opening Brief *State v. Guzek*, (*Guzek* III) S45272 at pages 326-331. See Supp. App. "A".

The thrust of Mr. Guzek's claims and arguments before the Oregon Supreme Court, was that the refusal of the trial court to admit the foregoing evidence was contrary to his

privileges under the Oregon Evidence Code, and denied him a fair trial by preventing him from impeaching the testimony of the only two percipient witnesses whose highly questionable original testimony led to Mr. Guzek being condemned as the "ringleader" and "mastermind" of the homicides. The proffered evidence also impeached the codefendant's prior testimony in many other respects. Similarly, the alibi testimony impeached the codefendants by tending to prove, at a minimum, that the crimes could not have been committed at the time claimed by the codefendants. While most of these offers of proof related to the "circumstances of the offense" they were not offered as substantive evidence, but rather as impeachment.

Certainly the Eighth Amendment is implicated any time a capital sentencing proceeding is unfair, as noted by Mr. Guzek below. In accordance with well-established Oregon jurisprudence,[9] realizing that his claims could be easily resolved on a sub-constitutional basis, Mr. Guzek extensively briefed his assignments of error under Oregon statutory law, including the Oregon Evidence Code. While he certainly made reference to the Eighth Amendment and relevant case law of this Court, sufficient to preserve such arguments on higher review, it is clear from Mr. Guzek's briefing in this matter that neither party expected the Oregon Supreme Court to make this into a federal case. In light of the foregoing (particularly since the alibi evidence comprised two of several desired items of impeachment of the state's absent, star witnesses) it is easily seen why there is a strong likelihood the Oregon Supreme Court will modify and clarify the basis for it's decision, if

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[9] *See e.g. State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983); (Oregon Supreme Court examines Oregon constitutional claims, only reaching federal constitutional claims when first level of inquiry is inadequate for rendering decision); *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982) (Oregon Supreme Court will not resolve claims under state or federal constitution, even if raised thereunder, when such claims may be resolved solely by resort to state statute).

provided an opportunity to do so by remand. Immediately reaching a federal constitutional issue – particularly where an assignment of error was not particularly framed as such – is a clear aberration[10] from the Oregon Supreme Court's longstanding jurisprudential policy. *See*, note 4.

With respect to the ruling admitting the mother's alibi evidence, it bears mentioning that at the time the Oregon Supreme Court handed down the decision in Mr. Guzek's case, it was sitting with only a quorum of five members, rather than a full seven-member court[11]. With respect to the alibi evidence, the decision was 3-2. As a result of the state's failure to address the admissibility of the grandfather's alibi evidence under state law, and because the Oregon Supreme Court was not sitting at full strength when issuing its ruling, the most this Court should do is to remand the case to the Oregon Supreme Court to have it clarify the basis for holding the mother's alibi evidence admissible in Mr. Guzek's fourth re-sentencing proceeding. In accordance with this Court's jurisprudence in such circumstances, the most appropriate disposition would be remand to the Oregon Supreme Court for clarification. *California v.* Krivda, 409 U.S. 33 (1972) (Per Curiam);[12] *see also*, *Enterprise Irrigation*

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[10] For example, with respect to each proffered item of impeachment evidence, the court ruled on sub-constitutional statutory grounds; "* * * defendant argues that his proffered evidence of inconsistent statements by Wilson and Cathey was 'very powerful' impeachment evidence, in other words, that it tended to show that the jury should not trust Wilson and Cathey's transcript testimony about defendant's role in the murders. Because defendant offered his evidence for that purpose, it did not qualify as hearsay, and the trial court erred by excluding it on that basis." *Guzek*, 336 Or. at 449.

[11] Former Justice (now Oregon Governor) Kulongoski, self-recused, having been Oregon Attorney General during much of the latter half of this case's 18-year history. Kislter, J., self-recused, having represented the State of Oregon in proceedings below, *State v. Guzek*, S38455, wherein he appeared at oral argument on behalf of the State of Oregon.

[12] "After briefing and argument, however, we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both. In reaching its result in this case, the California court cited pertinent excerpts from its earlier decision in *People v. Edwards*, 71 Cal. 2d 1096, 458 P. 2d 713 (1969) (*en banc*), which relied specifically upon both the state and federal provisions. 5 Cal. 3d, at 367, 486 P.

Footnote continued...

District v. Farmer's Mutual Canal Co., 243 U.S. 157, 163-65 (1917).[13] Since Petitioner acknowledges that "this Court has not resolved the precise issue here," and further recognizes that other states and the United States Court of Appeals for the Fifth Circuit have permitted residual-doubt evidence in capital sentencing proceedings (Petition 17-20), this is an appropriate response by this Court given the posture of the case and the shortcomings of Petitioner's presentation of the argument below.

While admission of the mother's alibi evidence appears to be based largely on interpretation of federal constitutional law, the Oregon Supreme Court cautioned:

> We turn to the question of the relevance of defendant's remaining alibi evidence -- specifically, his mother's testimony. The state begins its argument with the unassailable premise that capital penalty-phase proceedings occur only if a jury has found a defendant guilty of the substantive offense. From that, the state urges that we

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(...continued)

2d, at 1269. Thus, as in *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196-197 (1965), "while we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate." *Id.* 409 U.S. at 34-35.

[13] "Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. *Hammond v. Johnston*, 142 U.S. 73, 78; *Eustis v. Bolles*, 150 U.S. 361; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112, 116; *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468; *Southern Pacific Co.* v. *Schuyler*, 227 U.S. 601, 610. It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. *Pierce v. Somerset Ry.*, 171 U.S. 641, 648; *Lowry v. Silver City Gold & Silver Mining Co.*, 179 U.S. 196. n1 But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other our jurisdiction is plain. See *Moran v. Horsky*, 178 U.S. 205, 208; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe v. Thomas*, 207 U.S. 93, 99; *Vandalia R.R. Co.* v. *South Bend, ibid.*, 359, 367. But, where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635; *Eustis v. Bolles, supra*, p. 369; *Leathe v. Thomas, supra*; *Arkansas Southern R.R. Co.* v. *German National Bank*, 207 U.S. 270, 275." *Id.* 243 U.S. at 163-65.

> infer that evidence of innocence is irrelevant to the penalty-phase proceeding. **However, as is clear from this court's case law**, as well as decisions of the United States Supreme Court, the question of relevance of a capital defendant's proffered evidence in a penalty-phase proceeding is not that simple. Its relevance is, instead, **a matter of statutory construction** in the **context** of federal constitutional requirements.

Id. 336 Or. at 451. (Emphasis added). This passage makes clear that the Oregon Supreme Court's ruling in this case was not necessarily controlled by federal constitutional jurisprudence, but merely informed by this Court's holdings. This matter simply is not in an appropriate procedural posture for review[14].

C.

IN COMPLIANCE WITH *HOWELL V. MISSISSIPPI*, RESPONDENT OFFERS ADDITIONAL ARGUMENTS AND AUTHORITIES.

Pursuant to *Howell v. Mississippi, supra*, Mr. Guzek submits that on a constitutional level, admission of the alibi evidence was required under the Eighth Amendment (Cruel and Unusual Punishment Clause; right to fair capital sentencing procedure); Due Process Clause of the Fourteenth Amendment (procedural and substantive due process), and the Sixth Amendment (Confrontation Clause) to the United States Constitution. This is so, even though his primary claims below involved issues resolvable on a sub-constitutional level; and even though his arguments below were predicated almost exclusively on his right to impeach the testimony of absent witnesses rather than upon a right to offer alibi as substantive evidence. In other words, -- as noted in his brief – he sought to introduce certain evidence tending to negate his guilt under a theory of impeachment. This is not to say, however, that

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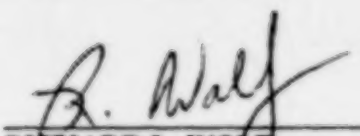
[14] If however, this Court, rather than remanding the case to the Oregon Supreme Court for clarification, or simply denying the petition, instead grants certiorari, judicial economy and issues of overriding national importance and integrity of the judicial system countenance granting review of the issues raised in Mr. Guzek's petition.

he did not raise and preserve the issue of his right under the foregoing United States Constitutional provisions to introduce alibi evidence as a "circumstance of the offense" pursuant to this Court's decisions *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978), *and Penry v. Lynaugh*, 492 U.S. 302 (1989). Mr. Guzek specifically adopts and incorporates each recited basis for admissibility of the alibi evidence presented in his opening brief (Supp. App.) together with the reasoning of the Oregon Supreme Court below and authorities cited therein.

CONCLUSION

This Court should deny Petitioner's petition for a writ of certiorari, or in the alternative, remand the case to the Oregon Supreme Court to permit clarification of whether the ruling in question was based on independent and adequate state law, or upon a federal constitutional provision.

Respectfully submitted,



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Case Number: 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON, PETITIONER,

VS

RANDY LEE GUZEK, RESPONDENT.

CERTIFICATE OF SERVICE

I, Richard L. Wolf, counsel of record for Petitioner, Randy Lee Guzek, under penalty of perjury, certify that pursuant to Rule 29.2, Rules of the Supreme Court, service of the attached Motion for Leave to Proceed *in Forma Pauperis*, Respondent's Brief in Opposition to the Petition for Writ of Certiorari and Appendix on counsel for Petitioner, State of Oregon, by depositing in the United States Post Office, Portland, Oregon on March 9, 2005, first class postage prepaid, a certified, exact and full copy thereof addressed to:

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